MAY 14, 2008 4:06 PM | POSTED BY NEWS | QUESTIONS & COMMENTS 0

Secret Laws, Secret Courts, Secret Constitution

by Justin Florence, Fellow at the Georgetown Center on National Security and the Law

The Senate Judiciary Committee recently approved the bipartisan Kennedy-Specter-Leahy State Secrets Protection Act (S. 2533). The Act would provide federal courts with a set of tools to resolve civil cases in which the Government invokes the state secrets privilege. Under current practice, courts often do not have the opportunity to review key evidence before dismissing these cases, allowing the Government to avoid scrutiny of its actions. The Senate Bill, and a similar bipartisan bill in the House, would prevent Executive Branch abuse of the privilege, allow courts to provide justice to litigants, and protect national security secrets from improper disclosure. (As examples of the latter, the Judiciary Committee voted to require courts to give "substantial weight" to the national security concerns of Executive Branch officials, and to limit certain proceedings to attorneys with security clearances.)

I and many others have made the case elsewhere for why Congress should pass legislation along these lines. Unfortunately, Attorney General Mukasey has invoked the Administration's constitutional theory of unfettered executive power as a reason for why President Bush will veto bipartisan congressional state secrets privilege reform. Rather than restate the affirmative case for the State Secrets Protection Act, I'll use this post to respond to the Attorney General's position, and to connect the state secrets privilege to another issue recently before the Senate Judiciary Committee.

The Bush Administration's position is that Congress cannot legislate on the state secrets privilege because in this context the Executive Branch has the constitutional prerogative to decide when courts may hear cases challenging Government policies, and which evidence courts may consider. This is a surprising theory for an Administration that purports to follow the Constitution's text and its original meaning, for the Constitution's text nowhere mentions the state secrets privilege, and the Supreme Court didn't recognize the privilege until 1953. In contrast, Article III explicitly gives the federal courts authority over cases and controversies arising under the Constitution and the laws of the United States. And Article I authorizes Congress to create jurisdiction – and, accordingly, rules of procedure and evidence – for the lower federal courts.

In the Administration's view, however, executive power trumps the constitutional roles of the coordinate branches of government. So the Administration can invoke the state secrets privilege if it doesn't want federal courts to consider the legality of, say, its warrantless wiretapping or torture and rendition programs.

A hearing before a Senate Judiciary Subcommittee last week on a related issue – Executive Branch secret laws – highlights one reason why the Administration's approach to the state secrets privilege is so troubling. As ACS Board member and former Acting Assistant Attorney General, Professor Dawn Johnsen has explained, the Bush Justice Department's Office of Legal Counsel creates its own law through legal opinions that nullify or provide skewed interpretations of Acts of Congress (for example, the John Yoo memos reading away criminal prohibitions of torture and warrantless wiretapping). Because the Administration hides these legal opinions from not just the public, but also members of Congress, the OLC opinions become, in effect, secret laws. If Congress doesn't know how the Administration interprets or enforces the laws, the Executive Branch is able to usurp the core legislative function.

Not scared yet? You should be. When the Administration's practice of making secret laws is combined with its expansive use of the state secrets privilege, the Executive Branch can avoid any oversight or scrutiny of even blatantly illegal and unconstitutional policies. The Executive Branch, through its secret DOJ opinions, can create its own law without congressional knowledge. When those secret laws affect people's lives, and so are challenged in court, the Executive then invokes the state secrets privilege to keep the judiciary from adjudicating whether the Administration's secret laws are, in

to keep the judiciary from adjudicating whether the Administration's secret laws are, in fact, legal.

As far-fetched as this may sound, it is exactly what has happened with the Administration's interrogation and surveillance programs. So forget what you learned in high school – under the Bush Constitution, the President is not just the enforcer of the laws, but also the lawmaker and adjudicator.